No. 490

DEC 7 1953

HAROLD B. WILLEY,

Supreme Court of the United States

THE P. DOUGHERTY COMPANY,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Supreme Court of the United States

THE P. DOUGHERTY COMPANY,
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UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

The Petition of The P. Dougherty Company, respectfully shows:

Summary Statement of Matters Involved.

This is a petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit, to review its decision and mandate wherein by a divided Court (four to three) it directed that petitioner's libel be dismissed, thereby reversing the decision and decree of the United States District Court, for the District of Delaware, which had awarded petitioner recovery of one-half of its damages in an action in Admiralty entitled "The P. Dougherty Company against United States of America."

After the customary argument before three Judges of the Court of Appeals on June 5th, 1952, and before decision, the Court on its own motion directed re-argument before the Court en banc, on December 1st, 1952. Decision was rendered September 9th, 1953, four Judges concurring in the prevailing opinion. The Chief Judge, in a dissenting opinion, stated petitioner should recover all of its damages, in which conclusion he was joined by another Judge who

wrote a supporting dissent. The third dissenting Judge wrote that the District Court's decree dividing damages should be affirmed. Petitioner's application for re-argument was denied September 30th, 1953.

The issue is whether the United States is liable under the Public Vessels Act* (46 U. S. C. 781, et seq.) for damages sustained by petitioner's barge *Harford* when the United States Coast Guard cutter *Mohawk,* while towing her, negligently struck a well known and well lighted breakwater, thereby allowing her to strike the same breakwater, in clear, calm weather, without any unusual wind or tide, after having picked up the *Harford* at sea on the request of a privately owned tug (not connected with petitioner) following the parting of that tug's hawser.

The Statutes Involved.

The suit was under the Public Vessels Act (March 3rd, 1925, C 428 Sec. 1, 43 Stat. 1112, 46 U. S. C. 781*) which authorizes suit against the United States "for damages caused by a public vessel."

As Sec. 2 of that Act provides that such suits ". . . shall be subject to and proceed in accordance with the provisions of Chapter 20 of this title . . ." such chapter —The Suits in Admiralty Act—authorizing suits against the United States for damage caused by its merchant vessels (46 U. S. C. 741, et seq.*) must also be considered. Sec. 3 of that Act (46 U. S. C. 743*) provides in part:

> "Such suits shall proceed and shall be heard and determined according to principles of law and to rules of practice obtaining in like cases between private parties. * * *"

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* See Appendix.

The Questions Presented.

Except to the extent that the conclusions of the majority of the Court of Appeals are in conflict with decisions of this Court, as pointed out in the Chief Judge's dissenting opinion, none of the questions of law involved have been directly passed upon by this Court and as the majority opinion admits, the decision is unprecedented. The questions may be stated:

1. Is the Public Vessels Act, which permits suit against the United States for damages caused by government public vessels under circumstances which would impose liability on private vessels, to be construed so as to carve out an exception (not stated in the Act) which bars suits against the United States when the damage is caused by Coast Guard vessels, even though due to negligence of such vessels?

2. Are the rules of law and evidence in a case involving the United States Coast Guard different than those applicable in an Admiralty action involving private parties or governmental agencies other than the Coast Guard?

3. What degree of care is required of a Coast Guard vessel which continues rendering services to the "salved vessel" after all elements of danger, emergency, or unusual risk have passed, and while the Coast Guard is performing a simple, routine towage operation in bringing the "salved vessel" to a point for mooring or transfer to the custody of another vessel?

4. Is not the United States Coast Guard in the performance of its duties required to use due care measured by the exigencies of the situation and the opportunity for

the exercise of care, in other words, reasonable care in the existing circumstances?

5. Is the standard of care different when the services are being performed by a Coast Guard vessel than when a similar service is rendered by a private vessel?

The importance of the matter to the United States itself, and to the entire maritime industry of the United States, vessel owners, shippers and insurers, is at once apparent. Such importance was expressly recognized in the majority opinion of the Court of Appeals as well as tacitly by the Court's action in directing on its own motion that the case be argued again before the Court en banc.

The Opinions Below.

The District Court in an opinion reported at 97 Fed. Supp. 287 (and appearing in the record at p. 68a of petitioner's appendix), held that under numerous authorities one performing a salvage operation (if the *Mohawk's* services should fall under that classification) is liable for lack of reasonable care under the circumstances; that the *Mohawk* did not exercise reasonable care in that she failed to lay a proper course, failed to maintain proper speed and failed to increase speed or change course in sufficient time to avoid striking the breakwater, although the danger thereof was becoming increasingly apparent, and also held that improper steering of the barge contributed to the damage and granted petitioner as libelant an interlocutory decree for fifty percent of its damages.

The majority of the Court of Appeals accepted the District Court's finding of negligence on the part of the *Mohawk* which put the *Harford* in a position of danger, but (on p. 13 of the opinion) stated:

"We are of opinion that public policy dictates that the United States should not be liable for fault of the Coast Guard in the field of rescue operations."

Apparently carrying out the public policy as stated above, the majority of the Court of Appeals seemingly disregarded established rules of law under which liability would fall on towing vessels in circumstances similar to those here involved, and also disregarded the rules of law and evidence applicable in cases involving collisions between private vessels and stationary objects*. It also concluded that a private salvor is not liable for failure to exercise reasonable care, but that gross negligence or willful misconduct must be proven.

The minority of the Court of Appeals held that in view of this Court's decision in *Canadian Aviator Ltd.* v. *United States*, 324 U. S. 215, 89 L. ed. 901 (1945), the Court of Appeals was no longer free to decide whether public policy was to be considered in connection with the imposition of liability on the United States for negligent acts of public vessels. After quoting Sections 1 and 2 of the Public Vessels Act, and Section 3 of the Suits in Admiralty Act**, the chief dissenting opinion, in support of its premise that questions of public policy are no longer open under the Public Vessels Act, relied upon the following language from this Court's opinion in the *Canadian Aviator* case (*supra*)

"* * * 'Since we hold that the Public Vessels Act was intended to impose on the United States the same liability (apart from seizure or arrest under a libel

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* *The Virginia Ehrman* v. *Curtis*, 97 U. S. 309, 24 L. Ed. 890; *The Oregon*, 158 U. S. 186, 39 L. Ed. 943; *The Gladiator*, 79 Fed. 445; *The Victor*, 153 F. 2nd 200.

** See Appendix.

in rem) as is imposed by the admiralty law on the private shipowner, it remains (only) to be considered whether petitioner states a valid cause of action under general principles of admiralty law, *in rem and in personam.*' * * *"

Following the quotation the chief dissenting opinion states:

"I conclude that under the ruling in *Canadian Aviator* both the procedural and substantive law applicable to the instant controversy must be determined by examining the principles that would govern similar litigation between private shipowners. A special rule of exemption may not be created by judicial decision for Coast Guard vessels. But the majority take the view that public policy requires that the United States should not be liable for any 'fault' or tort of the Coast Guard in the field of 'rescue' operations."

* * * * * *

"* * * I cannot bring myself to believe that Congress, implicitly and *sub silentio,* intended to relieve the United States for liability for the torts of Coast Guard vessels. In asserting the contrary proposition I cannot help but believe that the majority is substituting sentiment for the plain provisions of the Public Vessels Act. I do not decry the bravery of the Coast Guard or its usual competency but we are dealing in the instant case with an Act of Congress clearly expressing the congressional intent, and with certain specific acts of the Coast Guard in the course of its operations with the *Harford.* The conclusion seems inescapable that the United States must answer for the *Mohawk's* 'fault' or torts."

The other dissenting Judges agreed with the above stated excerpts.

Referring to the reasoning by which the majority reached the conclusion of freedom from liability on the part of the United States, the dissenting Judges concurred in the following statement in the chief minority opinion:

> "To hold the *Mohawk* not guilty of fault in navigation under the circumstances, as do the majority, seems almost incredible. Here is a towing vessel which puts *herself* as well as her tow on a breakwater and the majority say that she was not at fault. When a towing vessel casts herself on a breakwater under the circumstances at bar I am astonished that an experienced admiralty court should hold that her navigation was without blame. Finding the *Mohawk* to be without fault in herself striking the Breakwater, should not the majority, as an inherent necessary corollary, hold the *Harford* liable for the accident to the *Mohawk*? Should it not be the rule that tows, when tows and towing vessels go aground, should be held liable for the damage sustained by the towing vessels? Such would be a novel departure from existing law but is it not the rule actually set up by the majority opinion in the instant case? * * *"

All three dissenting Judges were of opinion that viewed in the light of the decisions involving private vessels (the standard set by the Public Vessels Act) the *Mohawk* was clearly guilty of negligence contributing to the damage, and two of them considered such negligence the sole cause of it. Likewise, on the authority of decisions in cases involving private parties, the minority entertained no doubt that ordinary negligence as distinguished from gross negligence or willful misconduct is sufficient to impose liability on the United States as well as on a private party rendering similar services.

Reasons for Allowance of the Writ.

1. It is self evident, we submit, that the majority decision is unprecedented in many respects. In so far as it holds that public policy dictates a certain class of government vessel shall not be liable under the Public Vessels Act it is in direct conflict with the last authoratative decisions of this Court. In so far as it applies rules of law and evidence different than those followed in private vessel cases, it is in conflict with the statute and with decisions of the Courts of Appeals for numerous other circuits.

2. The principal question, viz: whether the United States is liable under the Public Vessels Act for negligence of a Coast Guard vessel is so important to the United States itself that respondent may be well advised to join in the present petition. The same question is of general interest to owners of vessels, shippers of goods and insurers of each. It should be settled finally and authoritatively at the very first opportunity.

3. Equally important is the question whether the Public Vessels Act may be construed in such manner that the Court and not Congress may determine which class of government vessels are within and which outside of its terms. The results of over 25 years litigation to construe the Act may well be upset by this decision.

4. The entire maritime world is interested in the final and authoritative fixation of the standard of care required of a United States Coast Guard vessel.

5. It is of extreme importance to the maritime industry of the United States to obtain a final ruling whether different rules of law and evidence are to be followed in Public Vessels Act cases involving Coast Guard vessels than apply in Public Vessels Act cases involving other public vessels, or in cases between private parties.

6. The majority opinion, we submit, contains serious errors of law and its determination of the important questions above was erroneous in many respects. Such errors effect not only the parties to this litigation, but the United States and the maritime public in general.

Jurisdictional Basis.

The judgment of the Circuit Court of Appeals was entered on September 9, 1953. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1), Act of June 25, 1948, c. 646, 62 Stat. 928, and petitioner proceeds pursuant to the U. S. Sup. Ct. Rule 38, 28 U. S. C. A.

Argument.

The minority opinions of the Court of Appeals in this case so convincingly demonstrate the soundness of petitioner's case, and so clearly show the reasons for granting the writ sought, that additional discussion in brief seems a needless burden upon the time of this Court. Petitioner, for it's brief, therefore, respectfully adopts and submits the dissenting opinions of the Judges of the Court of Appeals.

Conclusion.

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHER E. HECKMAN,
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December 5, 1953.

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December 5, 1953.

Appendix.

PUBLIC VESSELS ACT

SECTION 1.

A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: PROVIDED, That the cause of action arose after the 6th day of April, 1920. Mar. 3, 1925, c. 428, §1, 43 Stat. 1112, 46 U. S. C. 781.

SECTION 2.

Such suit shall be brought in the district court of the United States for the District in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of chapter 20 of this title or any amendment thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest. Mar. 3, 1925, c. 428, §2, 43 Stat. 1112, 46 U. S. C. 782.

SUITS IN ADMIRALTY ACT

The following Sections are part of Chapter 20 of Title 46.

SECTION 1.

No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provisions herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: PROVIDED, That this chapter shall not apply to the Panama Railroad Company. Mar. 9, 1920, c. 95, §1, 41 Stat. 525, 46 U. S. C. 741.

SECTION 2.

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and

effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States. Mar. 9, 1920, c. 95, §2, 41 Stat. 525, 46 U. S. C. 742.

SECTION 3.

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or a corporation mentioned in Section 741 of this title may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privatly owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation given prior to March 9, 1920, in admiralty causes by the United States or the United States Maritime Commission, shall become void and be surrendered and canceled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 748 of this title. Mar. 9, 1920, c. 95, §3, 41 Stat. 526; Ex. Ord. No. 6166, §12, June 10, 1933; June 29, 1936, c. 858, §§203, 204, 904, 49 Stat. 1987, 2016, 46 U. S. C. 743.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 490

THE P. DOUGHERTY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS

The opinion of the District Court for the District of Delaware (R. 171-185) is reported at 97 F. Supp. 287. The opinions in the Court of Appeals for the Third Circuit (R. 191-235) are reported at 207 F. 2d 626.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1953 (R. 244). The petitioner's petition for rehearing was denied on

September 30, 1953 (R. 245). The petition for a write of certiorari was filed on December 7, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the special circumstances of this case, liability for damage to a rescued vessel, in the course of an uncompensated rescue operation by the Coast Guard, may be imposed on the United States where both courts below found that, despite the negligence of the Coast Guard cutter, the mishap would not have occurred but for the negligent failure of the rescued vessel to follow the Coast Guard cutter.

STATUTE INVOLVED

The pertinent provisions of the Coast Guard's authorization to rescue persons and to protect and save property are set forth in the Appendix, *infra*, p. 13.

STATEMENT

The libel in admiralty by the owner of the rescued barge HARFORD—to recover $50,000 under the Public Vessels Act for damages sustained when it grounded on a breakwater in the course of a gratuitous rescue operation in tow of the United States Coast Guard cutter MOHAWK—arises out of the following circumstances:

The HARFORD was a coastwise barge, 267 feet long by 46 feet wide, without motive power but equipped with steering gear, carrying a crew of three, a master and two ordinary seamen (R. 94, 172-173, 192).

On the morning of April 22, 1947, the HARFORD and the barge GORDON C. COOKE were being towed by the commercial tug BARLOW when her towing hawser parted and the HARFORD collided with the COOKE off the Delaware coast and was cast adrift in a leaking condition, in stormy weather and rough seas (R. 12, 95, 173). At the request of the BARLOW, the Coast Guard Station at Cape May, New Jersey, ordered the Coast Guard cutter MOHAWK to proceed to the HARFORD and stand by (R. 21-22, 95).[1]

The BARLOW left for Lewes, Delaware, to pick up a new hawser (R. 23, 24, 95). The MOHAWK reached the HARFORD early that night and stood by. On the morning of the 23rd, the Coast Guard base at Cape May instructed the MOHAWK to tow the HARFORD to the Harbor of Refuge. After some hours' delay due to the fact that the HARFORD had trouble raising her port anchor (her other anchor being unusable) and after petitioner's authority to cut the anchor was obtained, the MOHAWK got under way with the HARFORD in tow. (R. 90, 96.)[2] It then advised the Coast Guard base that the HARFORD was unable to anchor and requested a commercial tug to take over the tow five miles from Overfalls Lightship, off the entrance of Delaware Bay (R. 49-51, 55, 90, 193). The MOHAWK was told that the tug BARLOW was unable to take the barge in tow and

[1] The MOHAWK was not equipped for towing but was built as an icebreaker in 1934 (R. 51). It was stipulated that the service rendered by the MOHAWK was not to be compensated for as a salvage or towage service (R. 72).

[2] There was about six or seven feet of water in the barge at this time (R. 13, 17).

was directed to proceed to the Harbor of Refuge. The MOHAWK reached Overfalls Lightship in the evening of April 23rd.

The entrance to the Harbor of Refuge is between (1) Cape Henlopen on the south and (2) the tip of the Harbor of Refuge Breakwater on the north. The MOHAWK originally set a course midway between Cape Henlopen and the breakwater, but sighting a vessel at anchor inside the Harbor of Refuge, altered her course so that she would pass between the vessel and the breakwater (R. 174). In the belief that both of the HARFORD'S anchors were unusable and that it would therefore be necessary to circle around the anchored vessel until the BARLOW or some other tug could take the HARFORD in tow, the engine speed of the MOHAWK was reduced (R. 174-175). However, despite steering hard left, the MOHAWK was being carried off to the right. Meanwhile, as the MOHAWK came close to the entrance, the HARFORD began to steer hard right, accentuating the effect of the current and the wind upon the MOHAWK (R. 97). When the HARFORD struck the end of the breakwater, the MOHAWK cut the towing hawser. The HARFORD, cast adrift while still outside the Harbor of Refuge Breakwater, was forced against the breakwater for about an hour until she was removed by the tug JACK (R. 97-98).

After trial, the district court held that the MOHAWK had not exercised the reasonable care exacted of persons engaged in salvage operations and that improper steering of the HARFORD con-

tributed to the damage (R. 99). The court said (R. 179-180):

> * * * the analogy to a privately owned vessel rendering gratuitous assistance is not, in my opinion, entirely complete. The maintenance of such vessels as the MOHAWK is undertaken by the government pursuant to statutory authority and at public expense. * * * The MOHAWK was prepared and equipped, in part, at least, to render assistance to vessels in distress. Under these circumstances I am of the opinion that such a vessel must be held to answer for damage which results from her failure to exercise with reasonable care the skill and competence which her crew possess or may reasonably be expected to possess, which would, at the least, be ordinary skill and competence in the performance of such duties.

Inasmuch as "* * * even the course adopted by the MOHAWK would have been a successful one had the HARFORD followed in a proper manner" (R. 185), the court, leaving the amount of the damages undetermined, awarded petitioner one-half of its damages (R. 185, 186).[3]

Both parties appealed from the interlocutory

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[3] The HARFORD had sustained two other separate and distinct casualties within the same period of two days, one before and one after the breakwater incident. The first was the collision with the COOKE which was severe enough for the HARFORD, a wooden barge, to cause the ultimate sinking of the COOKE. The second time she was again rescued by the MOHAWK after she had gone aground while in the tow of the tug JACK. (R. 61-62, 91, 175.) There is evidence that the damage at the breakwater, if any, was slight (R. 60, 90).

decree. The court of appeals, sitting *en banc*, and with four judges concurring in the prevailing opinion (Circuit Judges Kalodner, Maris, McLaughlin, and Hastie) reversed the decree and directed that petitioner's libel be dismissed. It said (R. 195):

> We do not agree that the negligence of the MOHAWK created liability as to her for three separate reasons: (1) the negligence of the MOHAWK was a "condition" and not a "cause" with respect to the happening of the accident; (2) the sole cause of the accident was the negligent failure of the HARFORD to follow the MOHAWK; and (3) the District Court erred in ruling as a matter of law that "Under the Public Vessels Act the United States is liable for damage due to the negligence of those in charge of the MOHAWK."

Although noting the United States was not a salvor, the court of appeals recorded its disagreement with the district court's ruling that even a salvor would be liable for simple negligence as distinct from gross negligence or misconduct (R. 206-207).

Three judges dissented. Two of the judges dissenting (Chief Judge Biggs and Circuit Judge Goodrich) believed that petitioner should recover all of its damages; the other (Circuit Judge Staley) was in favor of affirming the decree dividing the damages.

ARGUMENT

1. Only if this Court first reviews the evidence and then disagrees with both courts below in appraising it, will the Court reach petitioner's "prin-

cipal question" (Pet. 8)—the liability of the United States for negligence in rescue work—and the other questions discussed in the petition. The ruling chiefly challenged by petitioner was only a third alternative and "separate" ground of decision (R. 195, 201), introduced by the statement that "the District Court further erred in its disposition on still another score" (R. 201).

The court of appeals found that the negligence of the Coast Guard cutter MOHAWK was only a "condition" and not a "cause" of the accident and that the sole cause of the accident was the negligent failure of the HARFORD to follow the MOHAWK (R. 195, 200); the district court similarly concluded that "even the course adopted by the MOHAWK would have been a successful one had the HARFORD followed in a proper manner" (R. 185). If this Court should undertake to review the evidence but should fail to overturn this evaluation of the evidence by the courts below, consideration of petitioner's "principal question" would not be necessary to decide the case. *Page* v. *United States*, 105 F. Supp. 99, 102 (E. D. La.). Merely to establish the principle that the United States is liable where simple negligence of the Coast Guard is the cause of damage to a rescued vessel would not benefit a petitioner who has failed to persuade the court below that any negligence on the part of the Coast Guard was the proximate cause of any loss or damage.[4] In fact, petitioner would have to overcome

[4] The Petition for Rehearing recognized that the court of appeals decided the case on the grounds that the MOHAWK's negligence was merely a condition of the HARFORD's damage

two independent grounds on which the Court of Appeals rested before the third ground became a necessary issue. Cf. *Calmar SS Corp.* v. *Scott*, 345 U. S. 427, 428.

Petitioner has not sought review of the factual questions, however, and has not addressed itself to demonstrating error in the conclusions of the court below, nor to establishing that the rescued vessel did not have it within its power to avert the loss or that the faulty steering of the HARFORD was not the cause of the loss.[5] In the circumstances,

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and that the HARFORD had failed to follow the MOHAWK (R. 237).

The dissent of Chief Judge Biggs, which is virtually adopted as the Argument of the Petition (Pet. 9), also recognized the sufficiency of the other grounds when it said: "It is unnecessary for the majority decision to go so far for having held that the *Mohawk's* towing, since it had become a 'condition,' did not cause the collision of the *Harford* with the Breakwater, that portion of the majority opinion dedicated to the Coast Guard exception is purest *dicta*" (R. 215-216).

[5] In any event, there would be no occasion for this Court to review the factual issues. The court of appeals, sitting *en banc*, gave thorough and painstaking consideration to the record, as the opinions indicate. The case was argued June 5, 1952, and then set down for reargument before the court *en banc* on December 1, 1952 (R. 190, 191). The decision was not rendered until September 9, 1953 (R. 191).

The difference in the court's appraisal of the negligence of the Coast Guard vessel and the barge is apparent from the distinction it makes in affirming the trial court's conclusion that both vessels were negligent. With respect to the finding as to the MOHAWK's negligence, the court of appeals merely said the evidence did not disclose it to be "clearly erroneous" although an opposite conclusion might have been reached (R. 202-203). In contrast, as to the HARFORD's negligence, it said that the evidence "demonstrates it to be fully warranted" (R. 203).

The icebreaker MOHAWK did not purport to possess the specialized knowledge that the current along the harbor entrance was so strong that instead of aiming for the mid-channel, the normal passage, she would have aimed for the southern side to allow for being swept up to the northward. As an uncom-

petitioner is seeking to have this Court render a supererogatory or advisory opinion on an abstract intellectual problem without concrete impact on the rights and liabilities of the parties before it. See *Coleman* v. *Miller*, 307 U. S. 433, 460-1 (concurring opinion).

2. The legal problem of the liability of the Coast Guard in its rescue operations is neither a frequently recurrent one of great practical importance, nor is it ripe for adjudication by this Court. As the district court observed, this "is the first known instance of an action based on the negligence of the Coast Guard" (R. 176).[6] Moreover, "[n]o authority or precedent has been cited or found regarding the duty of a privately owned vessel giving gratuitous assistance to another" (R. 179, 207). The recently brought Coast Guard rescue cases have fallen by the wayside on other grounds, such as inability to prove negligence or to show that libelants were put in a worse position as a result of Coast Guard action. *Lacey* v. *United*

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pensated emergency rescuer, it did not warrant or hold itself out as having knowledge of a local area where it did not want to go. In fact, it had asked for a commercial tug to take over (R. 55, 90). See A.L.I. *Restatement of Torts*, Section 323, comment b.

Steering the HARFORD at the orders of the captain, who went below to work the HARFORD's clogged pumps, was an 18 year old seaman (R. 12, 14, 18, 63-64, 96, 182, 193). The district court was "of the opinion that even the course adopted by the MOHAWK would have been a successful one had the HARFORD followed in a proper manner" (R. 185).

[6] It was significant, the court of appeals noted, that for the first twenty-five years of the Public Vessels Act, there was no attempt to recover damages arising out of the rescue operations of the Coast Guard (R. 205-6). The rarity of suits is, of course, attributable to some extent to the high standards maintained by the Coast Guard.

States, 98 F. Supp. 219 (D. Mass.); *Page* v. *United States,* 105 F. Supp. 99 (E. D. La.); see opinion below, R. 201-202, n. 12.

There is no impelling reason why the issue should "be settled finally and authoritatively at the very first opportunity", in a relative vacuum, as petitioner urges (Pet. 8). Even if one were to assume that the Coast Guard could be held liable under the Public Vessels Act for negligence in rescue operations, there are several alternative standards of care which can be suggested: (a) a *sui generis* standard; (b) a standard like that for performers of acts of charity; (c) one like that for commercial or non-commercial salvors (cf. *The S. C. Schenck,* 158 Fed. 54 (C. A. 6); *Derrington* v. *City of Detroit,* 223 Fed. 232, 240-241 (C. A. 6); *The Henry Steers, Jr.,* 110 Fed. 578 (E. D. N. Y.); (d) or one like that for firemen or gratuitous bailees (cf. A. L. I., *Restatement of Torts,* Section 324, Comment d; Seavey, *Reliance Upon Gratuitous Promises Or Other Conduct,* 64 Harv. L. Rev. 913, 927, fn. 57 (1951)). If the United States is to be held liable, as petitioner contends (but we deny), the experience of further litigation will help in determining (1) the applicable standard of care for different kinds of rescues,[7] as well as (2) the degree of diligence with

[7] For instance, experience might add meaning to the emphasis in the petition that the HARFORD was picked up "at sea on the request of a privately owned tug (not connected with petitioner) following the parting of that tug's hawser" (Pet. 2). The tug was the BARLOW and the tow to which the cable was attached was petitioner's barge, the HARFORD (R. 10, 95, 173). "The MOHAWK passed her hawser to the HARFORD and the towage began at about noon on April 23, 1947" (R. 96). The dissociation from the request for help and the rescue operation itself is strained and comes after the event.

which the rescued vessel should set about to make arrangements for available commercial towing and salvage facilities.[8] There is especially good reason

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Experience might also disclose a disposition on the part of the rescued to undervalue the service and the danger and exaggerate the shortcomings of the rescuer, and provide a framework in which to consider the petitioner's suggestions that the United States should make amends for the availability of the Coast Guard for rescue work and that it has merely "invade [d] the field of so-called 'rescue' " and replaced available commercial salvors (R. 242-3).

[8] By Article 933 of the Coast Guard Regulations, the Coast Guard is prohibited from competing with private tugs and is directed to turn over a rescued vessel to commercial interests as soon as possible. Article 933 provides that the Commanding Officer, in extending assistance to vessels "shall not interfere with private enterprise, though he may assist private effort, and it shall be his duty to do so when he deems it necessary. He shall not use his vessel for towing private craft, except in cases of distress, and not even then if there be other and sufficient assistance at hand."

In view of the Coast Guard's intention to stand by the HARFORD and the men aboard only until the BARLOW could get a new hawser, its request that a tug come out and take over at Overfalls Lightship (R. 49-51, 55, 90, 193), and the owner's delay in employing one of the available commercial tugs to take over outside the Harbor of Refuge when the BARLOW failed to come out, it seems curious for petitioner to urge that "[a]s a result of the Coast Guard's performance of operations similar to the one here involved, private towing companies and salvage companies no longer maintain vessels at various ports available to assist craft which have suffered temporary disablement, but are not exposed to dangerous weather conditions" (R. 242). The MOHAWK was not officiously obtruding its towing services, but was forced into the situation by petitioner's inaction. Regardless of whether, as petitioner maintains, "the Barlow, without libelant's consent, requested the services of the Coast Guard" (R. 243), petitioner never rejected the benefit of the services solicited for it by the BARLOW, even after the HARFORD was allegedly out of the zone of danger, but suffered them to continue instead of making immediate arrangements (as was its duty) for the professional assistance that was in fact available. It is in effect trying to found a claim upon its own unexplained failure to relieve the MOHAWK in accordance with the Coast Guard regulations. Cf. *Stearns Co.* v. *United States*, 291 U.S. 54, 61-62. If other tugs rested on their oars and

to await further clarification of the legal principles controlling non-Governmental rescue operations (see the clash of opinion on this point in the court below (R. 206-7, 217 ff.)), for if the United States is held liable the assimilated standard under the Public Vessels Act would be "the principles of law * * * obtaining in like cases between private parties". *Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, 228. See also, "in the same manner and to the same extent as a private individual in like circumstances," the corresponding standard of the Tort Claims Act. *Dalehite* v. *United States*, 346 U. S. 15, 44.

CONCLUSION

The issue presented as to the standard of care required of the Coast Guard in its rescue operations could be reached only in the event that this Court should first review the evidence and overturn the finding of the courts below. It is accordingly submitted that the case is not in a posture appropriate for the consideration of this Court and the petition for a writ of certiorari should be denied.

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failed to come out, their inaction was in no way attributable to the Coast Guard, much less to the MOHAWK. Cf. *Lacey* v. *United States*, 98 F. Supp. 219, 220 (D. Mass.).

APPENDIX

Section 1 of the Act of August 4, 1949, 63 Stat. 501, 14 U. S. C., Supp. V, 88, provides in pertinent part (as it appears in 14 U. S. Code, Supp. V):

§ 88. Saving life and property.

(a) In order to render aid to distressed persons, vessels, and aircraft on the high seas and on waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may:

(1) perform any and all acts necessary to rescue and aid persons and protect and save property;

(2) take charge of and protect all property saved from marine or aircraft disasters, or floods, at which the Coast Guard is present, until such property is claimed by persons legally authorized to receive it or until otherwise disposed of in accordance with law or applicable regulations, and care for bodies of those who may have perished in such catastrophes;

(3) furnish clothing, food, lodging, medicines, and other necessary supplies and services to persons succored by the Coast Guard; and

(4) destroy or tow into port sunken or floating dangers to navigation.

(b) The Coast Guard may render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized.

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